standing dramatically, as state and federal law are filled with programs that subsidize localities.

Second, the facts regarding Ohio's LGF and LGRAF show that the ITC's effect on any given municipal fisc was minimal to begin with, and has been *zero* for years. Under the statute's default formula, Ohio generally puts 4.8% of franchise tax revenues into the LGF (4.2%) and the LGRAF (0.6%). Notably, none of those funds are "earmarked" by their place of origin, so dollars raised in Toledo do not determine dollars received by Toledo. Rather, any losses are shared among cities and other local governments across Ohio. That means that Respondents' grievance here about "lost revenues" is one shared with all Ohio taxpayers.

But more important, this entire formula has been rendered academic for the last five years, and will remain academic for the foreseeable future, as Ohio's General Assembly has repeatedly *suspended* the formula that channels franchise tax funds to the LGF/LGRAF, replacing the 4.8% figure with a fixed amount per biennial budget. See H.B. 94 (Ohio 2001); H.B. 95 (Ohio 2003); H.B. 66 (Ohio 2005). Extra dollars generated by the franchise tax were instead deposited in the State's General Revenue Fund, so any "loss" created by the Jeep Plant deal was literally *zero* for the LGF/LGRAF. Thus, any standing that once existed on that theory has long since collapsed.

2. Respondents' "ancillary standing" theory, which seeks to piggyback standing to challenge the ITC upon separate standing to challenge a property-tax exemption, should likewise be rejected.

As the Court explained in *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), "standing is not dispensed in gross." The Court further explained in *Lewis* that "[t]he actual-injury requirement would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches" if a plaintiff could turn a complaint about

one government action into a broad attack on other government actions. *Id.* at 357. Respondents seek to explain away *Lewis* by suggesting that the particular facts of that case showed that one claim was too distant from another, but that the general theory of linking some claims is allowed. Resp. Br. at 20 n.12. But that revisionist view cannot be squared with *Lewis's* language: "The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U.S. at 357.

Other cases confirm that the Court has used a bright-line rule requiring all plaintiffs to independently justify standing for *each* claim they advance. See *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.").

The cases that Respondents cite do not suggest otherwise. Several cited cases involve the supplemental jurisdiction statute, 28 U.S.C. 1367(a), but those cases and that statute do not involve ancillary *standing*. Supplemental jurisdiction exists when a plaintiff has *two* genuine controversies, but only one independently meets federal jurisdiction. Nothing in the statute *creates* standing where it does not exist. Moreover, as a statute, it does not trump Article III's requirement of an "irreducible minimum" to create jurisdiction. "Irreducible" means just that: it does not mean "reducible sometimes."

In particular, Respondents blur the difference between a case in which one claim is supported by two different theories, and a case, as here, where two different claims are

advanced. For example, even if the Court in *Flast* implicitly allowed a Free Exercise "claim" to piggyback on an Establishment Clause "claim," both of those claims were really just theories to attack the same government action. Here, by contrast, Respondents attack two different legislative acts: the property-tax exemption and the ITC.

Finally, even if the Court were to adopt Respondents' ancillary standing notion (and it should not), that theory does not work here. Respondents seek to yoke together two independent claims by insisting that they arise from a "common nucleus of operative facts," namely, that both the ITC and the property-tax exemption induced the particular Jeep Plant at issue. But the "facts" of the Jeep Plant deal are not truly "operative" facts, as nothing about Respondents' claims turns on any facts about *this* use of the ITC and the separate property-tax exemption. The operative facts about the ITC are the statutory details of the ITC as a whole, not its use here. Indeed, Respondents do not ask the Court to cancel *only* that deal; rather, they ask the Court to declare the entire ITC statute unconstitutional and to fully enjoin its use in Ohio. J.A. 30a (Compl. ¶ 45).

Consequently, Respondents' attempt to switch to municipal standing should be rejected.

C. Ohio has never conceded taxpayer standing.

Respondents mistakenly insist that standing is justified here because "Petitioners have repeatedly declined to challenge Respondents' standing, either before the district court, in defending the appeal to the Sixth Circuit, or in their petitions for certiorari here." Resp. Br. at 22. They say that if standing were rejected now, then all the "effort and time, of both parties and courts, would be for nought . . . ." *Id.* at 23.

This argument, whether classified as a waiver theory, or estoppel, or by any other name, fails on both the facts and law. The factual premise—that Ohio or other Petitioners

conceded standing—is misleading, as we have always opposed the *taxpayer standing* that Respondents espouse, and our sole concession was that *one Plaintiff, Kim's Auto*, had standing. And the time invested in the case is no warrant to ignore Article III.[1]

1. Ohio has consistently asserted that taxpayer standing does not exist here. In its papers before the district court, Ohio expressly noted that, "Before turning to its argument in support of standing, the State would like to emphasize its position that the majority of Plaintiffs *do not have standing*." Ohio Opp. To Remand at 9 (emphasis added). We added, "the fact that Plaintiffs pay state taxes, standing alone, does not establish their standing to challenge these statutes." *Id.* at 10. To be sure, we agreed there was standing, but *only* because "at least one Plaintiff [Kim's] appears to have standing" as Kim's had a non-taxpayer, takings-based injury, so the rest of the plaintiffs did not matter. *Id.* at 7. Thus, for Respondents to suggest that Ohio's "concession" justifies standing now, when they have abandoned the Kim's-standing theory Ohio conceded and are pressing the taxpayer theory we vigorously opposed, simply blinks at reality.

Ohio's briefing before the Sixth Circuit reflected the same position. In the original briefing, the continued presence of Kim's made any standing argument academic, as Ohio agreed that Kim's had standing. Thus, Ohio did not challenge standing with regard to the other parties, just as courts routinely decline to resolve any standing disputes regarding other parties, if one party already has standing. See, e.g., *Dep't of Commerce v. U.S. House of Rep.*, 525 U.S.

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[1] Because the standing flaw here is jurisdictional, Respondents' reliance on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), is misplaced. In *Caterpillar*, the Court allowed "considerations of finality, efficiency, and economy," *id.* at 75, to overcome a mere statutory flaw regarding incomplete diversity, where the flaw was fixed by the time judgment was entered. Here, by contrast, the lack of standing is not merely a statutory flaw, and it still remains.

316, 330 (1999). And as soon as we learned about the change in facts that ended Kim's standing, Ohio objected that federal jurisdiction had been lost. See Ohio Rehearing Pet. at 9–10. That indisputable reality is hard to square with Respondents' description of an "absence of an earlier challenge to plaintiffs' standing . . . ." Resp. Br. at 28.

In short, Ohio's position on standing has remained consistent throughout this litigation, and accordingly, Respondents' estoppel and waiver-based standing arguments rest on a faulty factual predicate.

2. Perhaps Respondents' suggestion is not so much that Petitioners "deserve" to be stuck with standing, based on some misbehavior or estoppel on our part, but is instead that judicial economy counsels against pulling the plug at a late date. Any such suggestion should be rejected.

The Court has long been willing, and rightly so, to "undo" the merits of a long-fought case when standing disappears, as the case is then moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) And if one considers Kim's to have been the anchor for standing all along (whether rightly or wrongly, see Ohio Br. at 27), then this case is precisely on-point with *Arizonans*. One plaintiff had standing and lost it, and the presence of other putative plaintiffs has been irrelevant all along. Indeed, consider what the *Arizonans* result would have been if the one plaintiff there had been joined by several taxpayers claiming standing. Surely the Court would not have allowed those taxpayers to "stand in" and achieve standing, if they did not otherwise have it to begin with, merely because another party had kept the case going while resources were invested.

Moreover, the case for "letting standing slide by" here is further weakened by the fact that no court below has ever found that taxpayers have standing to challenge the ITC. Respondents acknowledge this lack of "focusing effects of litigation" below, Resp. Br. at 28, and they suggest that this

weighs in favor of standing. But the opposite is true: Standing ought not be blithely assumed when *no court* has found standing to be proper. As our opening brief explained, the district court *concluded* that standing existed across-the-board, but its analysis rested solely upon Respondents' independent challenge to the property-tax exemption, not upon their challenge to the ITC. Ohio Br. at 22–23. Unexamined standing is not worth upholding.[2]

Finally, Ohio notes that Respondents have put all of their prudential-standing eggs in the waiver basket, as they nowhere respond to the merits of our point that they do not satisfy the zone-of-interests test. Thus, if any concession is relevant here, it is Respondents' apparent concession that they cannot clear that hurdle if asked to. That is why they seek to sidestep it instead.

II. Respondents Do Not State A Viable Negative Commerce Clause Claim.

A. The ITC does not burden interstate commerce.

Though Respondents quote the relevant language from the Court's negative Commerce Clause precedent, they fail to grasp its import. Respondents contend that *any* tax benefit for in-state activity violates the Clause. The Court, however, has said that *only* those tax benefits that burden interstate commerce, for example by acting like a tariff or duty, violate the Constitution. And the ITC does not do so.

Contrary to Respondents' argument, the Court has never said that all preferential treatment of in-state activity violates the negative Commerce Clause. In fact, the Court has strongly suggested that subsidies—a clear example of

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[2] Lower courts are split on whether prudential standing issues are waivable. See, e.g., *UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 66 F.3d 621, 626 n.6 (3d Cir. 1995) (describing split). But the Court need not resolve that split here, as Ohio has not waived its standing objections.

such preferential treatment—are fine. See, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994). Rather, it is when the state-provided benefit for in-state activity is achieved through burdening interstate commerce that a state program crosses the constitutional line. Indeed, the language that Respondents quote illustrates this very point:

- "Permitting the individual States to enact laws that favor local enterprises *at the expense of out-of-state businesses* would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects." Resp. Br. at 30 (quoting *Boston Stock Exch.*, 429 U.S. at 329) (emphasis added).

- "As this Court has consistently recognized, 'discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter*.'" Resp. Br. at 32 (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)) (emphasis added).

While the ITC offers a benefit for in-state activity, Respondents do not identify any burden (and there is none) on out-of-state activity. Without that burden, Respondents' Commerce Clause challenge fails as a matter of law.

1. The Court has typically found such a burden only when dealing with transactional taxes. There, as the Court has noted, a differential rate "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch.*, 429 U.S. at 329. So, for example, in *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275 (1988), the Court struck a tax program that acted as a tariff, thereby "impos[ing] an economic disadvantage upon out-of-state sellers." Nor has the Court hesitated to strike other tariff-like tax laws, as all such laws create a competitive disadvantage by making it more difficult for out-of-state sellers to compete with their in-state rivals on price. See Ohio Br. at 38; Robert J. Firestone, *State Investment Tax*

Credits Do Not Violate the Dormant Commerce Clause, STATE TAX NOTES, Apr. 18, 2005, at 189, 190. Every time the two competitors go head-to-head, the in-state rival has a state-provided, tax-based, built-in pricing advantage.

For similar reasons, the Court has struck state laws that create barriers to entry into the State and that thereby shelter local businesses by reducing the incentive for out-of-state rivals to join the competitive fray. See *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 268 (1987).

The ITC, however, does not have the tariff-like or competition-reducing effect that the Court found constitutionally problematic in those cases. Firms base pricing decisions on their marginal costs. See Ohio. Br. at 41–42. Tariffs, of course, directly raise marginal costs—a five cent per unit tariff, for example, means that a producer's cost of producing each unit has increased five cents—thereby making it more difficult to compete with an in-state rival. But Ohio's ITC neither reduces an in-stater's marginal costs nor increases an out-of-stater's. The credit is not based on the number of units produced, but rather is akin to a lump-sum subsidy. And, of course, such lump-sum amounts do not change pricing or output decisions. See generally B. CURTIS EATON AND DIANE F. EATON, MICROECONOMICS 110–11 (3d ed. 1995). Thus, the ITC simply does not impose a tariff-like competitive burden.

2. Nor does this tax credit burden interstate commerce in any other way. Respondents rely heavily on *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), but that case is easily distinguishable. To be sure, there the Court did strike an income tax credit. But that credit, unlike the credit here, turned on not only the amount of in-state activity, but also the amount of out-of-state activity. As the latter increased, the tax credit decreased. Here, by contrast, DaimlerChrysler receives the same credit regardless of whether it previously conducted 100% of its business in Ohio or whether the Jeep

plant was its first venture into the State. Indeed, as Ohio noted in its opening brief, if anything, the credit may be worth more to first-time entrants, as the first dollar of their new investment "counts" for purposes of the credit, while those already in the State get a credit only if their new investment exceeds their average investment during a three-year baseline period. Ohio Br. at 43.

Similarly, the credit does not penalize DaimlerChrysler for future out-of-state investment. Unlike in *Westinghouse*, the credit has the same value whether DaimlerChrysler makes some, all, or none of its future investments in Ohio. That is, while Ohio provides DaimlerChrysler a benefit based on its activities in the State, it does not penalize the company for the percentage of its investment that is outside the State. And far from discriminating against interstate commerce, the incentive actually promotes such commerce by encouraging out-of-state firms to consider Ohio.

Trying to overcome this distinction, Respondents seek to wring from the Court's cases a broad proposition that *any* differential income tax treatment of in-state and out-of-state activity violates the negative Commerce Clause. Resp. Br. at 39–40. But the Court has never gone that far. Indeed, the Constitution *requires* State income taxes to take account of geography: A State may only tax that income that is fairly allocated or apportioned to the State. See Ohio Br. at 36.

Because state taxes must take geography into account, Respondents' real argument must be that the *only* way that a State's tax system can do so is through its apportionment mechanism, and that any other reference to state boundary lines violates the negative Commerce Clause. See Resp. Br. at 36 ("With its discriminatory ITC, Ohio has overridden its fair apportionment system . . . ."). But, here again, that argument cannot be squared with the Court's cases.

The Court has never said that Ohio must be indifferent as to whether new investment occurs in Ohio rather than in

Indiana. Indeed, the Court has insisted that States may use their tax policies to "compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336–37. Nor do States ever enact franchise tax credits that reflect such indifference. Franchise or income taxes are levied upon those corporate activities fairly attributable to activity within the State; and, not surprisingly, credits to these taxes are likewise based upon activities within the State.

To be sure, States may not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* See also *Armco Inc. v. Hardesty*, 467 U.S. 638, 645–46 (1984). But, as discussed above, that prohibition on protectionist barriers requires only that the credits be equally available to a State's taxpayers regardless of the extent to which they do business in other jurisdictions.

As noted above, Ohio's ITC readily meets that test. In doling out its ITC, Ohio does not ask where you came from, how long you have been doing business in the State, or where else you are conducting operations. The *only* question the ITC asks is how much you are investing in Ohio. And *that* question does not offend the negative Commerce Clause.

3. Finally, contrary to Respondents' suggestion, adopting Ohio's position—that the existence of out-of-state burdens matters—will not permit the States to "revive many of the discriminatory schemes struck down by the Court in new guises that use 'benefits' rather than 'burdens' to achieve identical practical effects." Resp. Br. at 43. A tariff is a tariff whether created through use of excise taxes on imports, or tax credits for local products, and Ohio is not arguing otherwise. Cf. Resp. Br. at 43 n.17. See also *Camps NewFound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 580 (1997) (striking tax that "functionally serves as an export tariff"). The point here is that the ITC does *not* functionally serve as a tariff, and does *not* impose a burden

on interstate commerce, either by design or in "practical effect." See Resp. Br. at 43 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Thus, the ITC does not violate the Commerce Clause.

B. The Framers' view of the Commerce Clause supports Ohio, not Respondents.

Respondents wrongly assert that the Framers' view of the Commerce Clause supports Respondents; in fact, it supports Ohio. Respondents acknowledge that the Framer's "central concern" was avoiding "tendencies toward economic Balkanization" See Resp. Br. at 29. But Respondents then take this one step farther, and assert that "[a]mong the primary threats" that the Framers sought to neutralize was the possibility that a State would use its tax system to "provide preferential treatment for in-state economic activity." *Id.* The historical record, however, belies this latter assertion.

According to a leading Commerce Clause historian the Framers had a narrow view of what it meant to "regulate commerce among the States." See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 423, 473 (1941). Far from a broad prohibition on state-provided incentives, the Commerce Clause was seen as preventing States from engaging in trade wars *through the imposition of duties and tariffs*. So, for example, Hamilton and Madison justified the need for the Clause by reference to the "experience[s] of foreign confederacies," such as Germany and the Netherlands, and in particular "to the prohibition of *internal tolls and customs* contained in the fundamental laws of those nations." *Id.* (emphasis added). The discussions of the clause during the convention similarly dealt with tariff-like enactments—export duties, imposts on imports, or shipping tolls. *Id.* at 471. Given the unanimity of this historical record, the commentator not surprisingly concluded that:

> It is clear that the grant of power to Congress was conceived of as preventing states from levying tribute on movement in commerce to and from other states. There is no hint that it meant anything more.

Id. at 472.

That is, as Ohio showed in our opening brief, the negative Commerce Clause is not designed to prevent States from laying out welcome mats, but rather to stop them from building fences that hinder the free movement of products and resources among the States. Or, in Hamilton's words, the Clause protects the free "interchange of [the States'] respective productions," and ensures "a free circulation of the commodities of every part." THE FEDERALIST NO. 11, at 89 (Clinton Rossiter ed., 1961) See also THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) (Commerce Clause prevents States from "load[ing] the articles of import and export, during passage through their jurisdiction, with duties."). Thus, a state law requiring DaimlerChrysler to sell its cars in Ohio, for example, or one imposing a duty on cars shipped into or out of Ohio, would surely trigger the Framers' concerns. But it is a blatant misstatement of the historical record to suggest, as Respondents do, that the Framers' fears extended to state laws that merely provide an incentive to locate within the State with no corresponding burden on interstate commerce. And that is all the ITC does.

C. Respondents' real complaint is their belief that the ITC is bad policy.

As Respondents have demonstrated throughout this case, at core their claims reflect a policy dispute with Ohio's legislature (and nearly every other State's as well). But, as much as Respondents may wish otherwise, policy arguments as to the effectiveness of locational tax incentives are irrelevant here. Whether or not ITCs are wise or effective are

legislative determinations, and, even if conclusive answers to those questions existed, those answers have little to do with the negative Commerce Clause. Contrary to Respondents' wishes, the negative Commerce Clause exists to protect interstate commerce, not to allow litigants to substitute their policy judgments for that of a State's legislature.

In their brief here, Respondents' focus on policy is clear from the start. They not only repeatedly contest the effectiveness of these incentives, but indeed introduce their argument with three unproven assertions. First, they state that these incentives "have minimal impacts on business decisions." Resp. Br. at 1. Second, they assert that "they impose high costs on states and localities in lost tax revenues." *Id.* Third, they allege these incentives exist only because "[t]he states are caught in a classic prisoners' dilemma which leaves all of them, their citizens who pay taxes and depend on services, and the national economy, all worse off." *Id.* The "proof" for these statements, they say, is found in a few legislative reports and articles. *Id.* at 2–4.

Much of their statement of the case is then an exegesis on their concerns about the costs of such incentives, and the impact that such costs allegedly will have on cities and school districts. They complain, for example, that Ohio's ITC may "seriously impair[]" the Toledo school district's "ability to fulfill its educational mission." Resp. Br. at 3. They also decry the alleged "shift of the costs of state and local government to other classes of taxpayers" that they say ITCs cause. *Id.* at 4. Nor is this policy focus new; it has been the central drumbeat of their case since its inception. See, e.g., Plaintiffs' Mem. in Opp. to Defendants' Motions to Dismiss Re: Inapplicability of Commerce Clause, at 6–7 (6th Cir. J.A. 356–57).

Of course, Ohio disagrees with Respondents on the merits of such incentives. Far from costing the State money, Ohio's legislature determined that such tax incentives help

Ohio compete for business globally, thereby enriching Ohio's economy, and benefiting, not hurting, Ohio's citizens. Other States overwhelmingly agree. As Ohio's opening brief noted, virtually every State that taxes businesses has some form of locational incentive (all of which violate the Constitution under Respondents' view). See Ohio Br. at 5. If, in fact, these States all felt "trapped" in a prisoners' dilemma as Respondents say, one might expect the States here to clamor for a uniform national rule preventing States from adopting such incentives. Such a rule, after all, would "save us from ourselves," freeing us from the race to the bottom. That the States instead argue the opposite shows that States view these programs not as some sort of second-best solution to a prisoners' dilemma, but rather as sound policy.

In the end, the point is that the negative Commerce Clause is not a license for federal courts to assess the efficacy of Ohio's (or any other State's) tax policy. To be sure, Ohio's tax system must conform to the Constitution, and it does. Respondents' stated concerns about Ohio's ability to educate its children or fund local government, however, are simply not relevant to the negative Commerce Clause inquiry. Respondents' repeated efforts to dispute the wisdom of locational tax incentives reveal that their true objection to these measures is grounded in policy, not in the Constitution. While such policy debates are a vital part of our democratic process, they belong in Ohio's statehouse, not this Court.

CONCLUSION

For the above reasons, the Court should vacate the decision below on the ITC for lack of standing, or, if it finds that standing exists, reverse the decision on the merits.

Respectfully submitted,

ADAM W. LOUKX
Senior Attorney
City of Toledo Law Dept.
Government Center,
Suite 2250
Toledo, Ohio 43604
419-245-1020
Counsel for Municipal
Petitioners

LISA E. PIZZA
Spengler Nathanson P.L.L.
608 Madison Ave.,
Suite 2250
Toledo, Ohio 43604
419-241-2201
Counsel for School Board
Petitioners

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
*Counsel of Record
STEPHEN P. CARNEY
Senior Deputy Solicitor
ERIK J. CLARK
Deputy Solicitor
SHARON A. JENNINGS
ROBERT C. MAIER
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Ohio Petitioners

February 22, 2006

(21) (13)

Nos. 04-1704, 04-1724

FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* ALPHAGENICS, INC., GREATER BALTIMORE TECHNOLOGY COUNCIL, MDBIO, INC., TECHNOLOGY COUNCIL OF MARYLAND, UPSTATE VENTURE ASSOCIATION OF NEW YORK, INC., AND 20/20 GENESYSTEMS, INC. IN SUPPORT OF PETITIONERS

FREDERICK A. PROVORNY
Counsel of Record
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, Maryland 21201-1786
(410) 706-1190

Dated: December 5, 2005

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Nos. 04-1704, 04-1724

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* ALPHAGENICS, INC., GREATER BALTIMORE TECHNOLOGY COUNCIL, MDBIO, INC., TECHNOLOGY COUNCIL OF MARYLAND, UPSTATE VENTURE ASSOCIATION OF NEW YORK, INC., AND 20/20 GENESYSTEMS, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF PARTIES SUPPORTED BY THIS BRIEF

This Brief *amicus curiae* is filed in support of the Petitioners.[1] The opinion of the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals") is reported at 386 F.3d 738 (6th Cir. 2004). Petitioners DaimlerChrysler Corporation and Wilkins, et al., have consented to the filing of this Brief pursuant to letters of Consent to the Filing of Amicus Briefs in Support of Either Party lodged with the Clerk on October 24, 2005. Respondents have consented to the filing of this Brief pursuant to a letter of consent on file with the Clerk.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici* include associations of companies and other interested groups engaged in bioscience-based businesses and high technology and those comprised of potential investors in such enterprises. The membership of the Technology Council of Maryland and the Greater Baltimore Technology Council includes not only publicly traded multinational companies but also companies in technology incubators engaged in cutting-edge innovation in fields such as biotechnology, information technology, software, nanotechnology, and advanced materials. The mission of the nonprofit MdBio, Inc. is to unify, empower and advance Maryland's bioscience industry, promoting

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[1] In accordance with rule 37.6, Counsel for the *amici* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief. University of Maryland School of Law students David Blazina, Aimée Drouin, Oliver Edwards, Kristine Grigorian, Joanne Hawana, Phillip Heller, James Knight, Winston Martindale, Enyinnaya Obi, Kelley Walsh, and Yue Zhu, student attorneys at the Maryland Intellectual Property Legal Resource Center, assisted in the preparation of this Brief.

corporate and economic development. AlphaGenics, Inc. and 20/20 Genesystems, Inc. are two emerging technology companies located at the Maryland Technology Development Center in Rockville, Maryland.

Maryland enacted the Biotechnology Investment Incentive Act in 2005. This Act provides limited income tax credits to investors in Maryland biotechnology companies. 2005 Md. Laws ch. 99. On April 28, 2005, the Attorney General of Maryland wrote to the Governor stating that the then-proposed legislation might violate the Commerce Clause.[2] Although the letter asserted that the decision of the Court of Appeals in this action was "not relevant to the issues raised by House Bill 664" as it then existed,[3] it also declared, "The *Cuno* case is the most far-reaching . . . in that it reaches tax credits available to out-of-state companies based on activities and job creation in the State . . . ."[4] The Attorney General's letter raises the distinct possibility that the decision of the Court of Appeals could result in invalidating the Maryland statute even if the Legislature addressed the issues the letter identified. This prospect has had an unsettling effect on the investment climate for early-stage biotechnology companies in Maryland.

Fledgling biotechnology companies experience enormous cash "burn rates" and encounter lengthy delays to commercialization because of the need to obtain patent protection and regulatory approvals. The decision of the Court of Appeals has cast a substantial cloud over the tax incentives that Maryland and most other states use to enhance their economic futures and promote innovation by nurturing their home-grown emerging technology companies and

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[2] Letter, dated April 28, 2005, from J. Joseph Curran, Jr., Attorney General of Maryland, to Governor Robert L. Ehrlich (attached as Exhibit).

[3] *Id.* at 3, note 3.

[4] *Id.*

reducing the risk to potential investors. There is a substantial probability that the uncertainty engendered by the decision below will exacerbate the already difficult task of emerging yet fragile enterprises such as AlphaGenics and 20/20 to raise capital from the private equity markets.

The Upstate Venture Association of New York, Inc. ("UVANY") is a group whose membership includes venture capital firms, private equity investors and financial institutions from New York and other states interested in promoting deal flow and investment in technology companies across New York. UVANY has member firms that have already invested or are considering investing in such companies.

In 2005, New York enacted a refundable research and development tax credit. 2005 N.Y. Laws ch. 61. UVANY is concerned that affirmance of the decision of the Court of Appeals will put the New York development tax credit and other tax measures designed to assist early-stage technology companies in New York at serious risk.

SUMMARY OF ARGUMENT

Innovation is expensive, and funding is its life-blood. Without resources to allow emerging technology companies to press forward with the development of new products and services to meet important societal needs, entrepreneurship and the engine for job creation it represents would be dealt a severe blow. Maintaining the lead that the United States currently enjoys in technology innovation against growing foreign competition is an important national priority. Many states, including Maryland and New York, have staked their economic futures and invested vast sums in achieving and maintaining leadership in this increasingly vital sector of the economy. Entrepreneurship has become an important component of business, engineering, and other academic

programs,[5] and venture capital and angel investing can now be found in many developed and developing countries.[6]

Against this backdrop of increasing interest in and support for technology commercialization, and the emerging companies at the forefront of these efforts, Respondents' suit represents a frontal assault on all state tax credit mechanisms used for economic development purposes. In the words of one of the architects of this action, it represents "pathbreaking litigation to combat corporate welfare."[7] However, in attacking a non-discriminatory economic development program used by the vast majority of states, this "pathbreaking litigation" suffers from two fatal flaws.

As an initial proposition, but one that disposes of this action completely, Respondents, with their attenuated interests and hypothetical and speculative injuries and unlikelihood of obtaining redress by a favorable decision, lack standing under Article III to avail themselves of the judicial power of the United States to challenge the Ohio statute.

Secondly, even if this Court were to find that any of the Respondents has standing, Respondents ask this Court to stray from its traditional case-by-case analysis of dormant Commerce Clause cases in at least two ways: First, the

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[5] *See, e.g.*, Jim Hopkins, *Venture capital 101: Entrepreneur courses increase*, USA TODAY, Jan. 5, 2004 (Ewing Marion Kauffman Foundation recently awarded $25 million to eight U.S. universities pledging to spread entrepreneurship education beyond business classrooms), at 1B, *available at* 2004 WLNR 6209380.

[6] *See, e.g.*, Jitendra Uttam, *Convergence of Finance, Technology and Entrepreneurship: The Role of Liberal Financial System in the Making of India's New Economic Growth Regime*, JOURNAL OF INTERNATIONAL AND AREA STUDIES, § 6 (June 1, 2005), *available at* 2005 WLNR 14739829.

[7] Northeastern School of Law Faculty website profile of Peter D. Enrich *at* http://www.slaw.neu.edu/faculty/f_enrich.htm, last viewed Nov. 23, 2005.